

Committee on Natural Resources

Rob Bishop Chairman
Mark-Up Memorandum

September 29, 2017

To: All Natural Resources Committee Members

From: Majority Committee Staff—Melissa Beaumont
Subcommittee on Oversight & Investigations (x5-7107)

Mark-Up: **H.R. 717 (Rep. Pete Olson)**, To amend the Endangered Species Act of 1973 to require review of the economic cost of adding a species to the list of endangered species or threatened species, and for other purposes.
October 3 & 4, 2017; 1334 Longworth House Office Building

H.R. 717 (Rep. Pete Olson), “*Listing Reform Act*”

Summary of the Bill

H.R. 717, introduced by Rep. Pete Olson (R-TX-22) on January 27, 2017, amends the Endangered Species Act (ESA) of 1973 to allow the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) to consider significant economic effects that may occur as a result of an ESA threatened listing or designation of critical habitat, and to decline to list the species as a result of those economic impacts.

H.R. 717 also authorizes FWS and NMFS to prioritize petitions to list a species as endangered or threatened under ESA at their discretion, as opposed to the current order in which a petition was received. Such discretion will allow the agencies increased flexibility to process petitions. The bill also removes the current 12-month deadline required by the FWS and NMFS to process petitions and requires that listing petitions be processed as expeditiously as practicable, which will reduce the number of lawsuits that can be filed on the basis of lapsed deadlines. The bill also requires FWS and NMFS to refrain from prioritizing listing petitions over delisting petitions.

Cosponsors

Rep. Michael Burgess (R-TX), Rep. Brian Babin (R-TX), , Rep. Louie Gohmert (R-TX), Rep. Greg Gianforte (R-MT), Rep. Paul Gosar (R-AZ), Rep. Pete Sessions (R-TX)

Background

Economic Impact

Pursuant to the Endangered Species Act (ESA),¹ the Secretary of the Interior or Commerce “must not include economic factors”² in listing decisions of endangered or threatened

¹Endangered Species Act of 1973, 16 U.S.C. § 1533.

species. Species listings, however, impact our national economy and can restrict the ability of State and local entities to provide for the public health and safety. Species listings also can curtail the right of industry and private landowners to utilize property and resources to generate income or to increase local development.³ The ESA's prohibition of economic considerations in listing decisions of endangered or threatened species⁴ should therefore be addressed.

H.R. 717, the "*Listing Reform Act*" would authorize the Secretary of the Interior to consider economic impacts in listing decisions for threatened species, and allow preclusion of the listing if the likelihood of significant, cumulative economic effects would result from the listing, or from the resulting designation of critical habitat.

H.R. 717 prohibits reconsideration of the decision unless the Secretary of the Interior finds there is danger of species extinction, or receives a new petition that includes alternative actions possible to avoid the economic impact of the listing.

Consideration of Petitions

Under the ESA currently, FWS and NMFS are required to make an initial decision concerning listing or delisting of a species within 90 days of receiving a petition. The agencies then have up to 12 months to issue a final determination as to whether a listing or delisting is warranted, not warranted, or warranted but precluded from listing at that time, in which case species are placed on a candidate list.⁵

Environmental lawsuits serve as a fundraising and revenue-generating tool for nongovernmental organizations, and the number of petitions agencies receive each year from these groups has generally increased since ESA's enactment.⁶ According to the Government Accountability Office (GAO), FWS received 170 petitions to list 1,446 species between fiscal years 2005 and 2010 alone, some of which called for listing of hundreds of species at one time.⁷

As nongovernmental organizations overwhelm agencies with large numbers of petitions for listings, the agencies have not been able to meet their statutory deadlines to properly review the data and science supporting a petition to list and have instead settled with the groups, leading to multi-species mega-listings conducted under non-transparent circumstances. Such listings are

²CONG. RESEARCH SERVICE, RL31654, THE ENDANGERED SPECIES ACT: A PRIMER 15 (2016).

³H. COMM. ON NATURAL RES., 113TH CONG., REPORT, FINDINGS AND RECOMMENDATIONS ON THE ENDANGERED SPECIES ACT (2014) (For example, in the past decade, the direct and indirect costs of the Bonneville Power Administration's compliance with ESA for various endangered salmon species has cost the Northwest electricity ratepayers on average \$750 million per year). *See also*, Press Release, Forest America, Black Pine Snake Endangered Species Listing Restricts Private Landowners (<http://forestamerica.org/blog/black-pine-snake-endangered-species-listing-restricts-private-landowners>) (Listing of the Black Pine Snake will cause economic hardship for foresters and private landowners).

⁴Endangered Species Act of 1973, 16 U.S.C. § 1531 (1973). *See also*, *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978).

⁵16 U.S.C. § 1533 (1973).

⁶*See*, U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-17-304, ENVIRONMENTAL LITIGATION: INFORMATION ON ENDANGERED SPECIES ACT DEADLINE SUITS (2017), <http://www.gao.gov/assets/690/683058.pdf>.

⁷*Id.* (For example, FWS received a "mega-petition" in 2007 petition calling for the listing of 674 species in the Southwest and Mountain-Prairie regions and in 2010, which requested the listing of 404 aquatic species).

to the detriment of many state and local communities that have no opportunity to submit comments or stakeholder input.⁸

Previous Legislation and Committee Activity

On June 28, 2017, the Subcommittee held a hearing examining the impacts of environmental litigation upon the Department of the Interior's (DOI) policymaking and the resulting shift in agency priorities, and redirection of time and resources away from the core mission of conservation.⁹ In addition, in the 113th Congress, the Committee held a full committee hearing on legislation to require the Secretary of the Interior to publish and make available for public comment a comprehensive and cumulative draft economic analysis at the time a proposed rule to designate critical habitat is published. It also included legislation requiring transparency of any ESA litigation complaint against the federal government, to allow affected states and other stakeholders an opportunity to intervene in the litigation, and to allow states prior approval before any ESA settlement prior to submission to any court.¹⁰

On July 19, 2017, the Committee held a legislative hearing examining H.R. 717 and four other pieces of legislation that provide for reforms to improve implementation of the ESA.¹¹ In his written testimony, FWS Deputy Director Greg Sheehan stated that H.R. 717 would reduce the potential for future litigation, which has been a burden for the Service in the past, and it would allow for more flexibility in prioritization of listing petitions based on need.¹² During the hearing, Sheehan emphasized the difficulty the agency has in adhering to deadlines for making a determination on a listing petition, which then exposes the Service to numerous lawsuits and shifts resources away from conservation of species.¹³

Rep. Pete Olson previously introduced this bill on April 30, 2015 as H.R. 2134 in the 114th Congress, and it was referred to the Committee on Natural Resources.¹⁴ The bill to be considered in this markup, H.R. 717, is identical to that version.

Section-by-Section Analysis of H.R. 717

Section 1. Short Title. The bill may be referred to as the Listing Reform Act.

⁸ See, Western Energy Alliance, *Environmental Groups Keep Suing Despite Vast ESA Settlement Agreements*, <https://www.westernenergyalliance.org/knowledge-center/legal/sue-and-settle> (last visited July 13, 2017) (FWS settled massive agreement behind closed doors with WildEarth Guardians and the Center for Biological Diversity on a combined 878 species in 2011. The scientific information utilized in the settlement listing decisions was not made available to the States).

⁹ Examining Policy Impacts of Excessive Litigation Against the Department of the Interior Before the H. Comm. on Natural Resources Subcomm. on Oversight and Investigations, 115th Cong. (2017).

¹⁰ See Legislative Hearing on H.R. 1314, H.R. 4319, and several other ESA-related bills, H. Comm. On Natural Res., 113th Cong. (2014).

¹¹ Legislative Hearing on H.R. 424, H.R. 717, H.R. 1274, H.R. 2603, and H.R. 3131, H. Comm. On Natural Res., 115th Cong. (2017) (Statement of Greg Sheehan, Deputy Director, FWS).

¹² *Id.*

¹³ Legislative Hearing on H.R. 424, H.R. 717, H.R. 1274, H.R. 2603, and H.R. 3131, H. Comm. On Natural Res., 115th Cong. 132(2017).

¹⁴ H.R. 2134, 114th Cong. (2015).

Section 2. Consideration of Economic Cost in Review of Listing Petitions Under Endangered Species Act of 1973.

Subsection (a) Consideration Required. Subsection (a) removes the current statutory deadlines outlined by ESA in which the Secretary is required to make a decision and take action on a listing petition and instead gives authority to the Secretary to prioritize consideration of petitions other than in the order they are received and as expeditiously as practicable. However, the Secretary must not give general priority to petitions to add a species to such list over a petition to remove a species from such list, which ensures one category of listing petitions is not significantly prioritized over others.

Subsection (b) Consideration of Significant, Cumulative Economic Effects. Subsection (b) amends ESA by including a provision to allow for the consideration of significant, cumulative economic effects that would result from the listing of a species as “threatened” or subsequent designation of critical habitat for the species. This subsection also outlines the conditions for which the Secretary may reconsider a decision to preclude a species from such list based on significant economic effects. These conditions include a determination that there is endangerment of extinction of the species or if the Secretary receives a new petition for the species that contains analysis of the areas affected by potential actions from such listing and identifies alternative actions that avoid the significant, cumulative economic effects.

Cost

Unknown at this time.

Administration Position

The Administration has stated its support of the Committee’s efforts to improve implementation of the ESA, such as through H.R. 717.¹⁵ FWS Deputy Director Greg Sheehan testified before the Committee in July 2017 that FWS is in support of giving flexibility to the Service in its implementation of ESA by allowing prioritization of petitions based on need and through the removal of deadlines for review of petitions.¹⁶ Such reforms are included in H.R. 717.

Effect on Current Law (Ramseyer)

Showing Current Law as Amended by H.R. 717

[new text highlighted in yellow; text to be deleted bracketed and highlighted in blue]

Section 4(b)(3) of the Endangered Species Act of 1973 (16 U.S.C. 1533(b)(3))

§1533. Determination of endangered species and threatened species

¹⁵Legislative Hearing on H.R. 424, H.R. 717, H.R. 1274, H.R. 2603, and H.R. 3131, H. Comm. on Natural Res., 115th Cong. (2017) (Statement of Greg Sheehan, Deputy Director, FWS).

¹⁶*Id.*

* * * * *

(b) Basis for determinations

(1)(A) The Secretary shall make determinations required by subsection (a)(1) solely (except as provided in clause (iv) of paragraph (3)(B)) on the basis of the best scientific and commercial data available to him after conducting a review of the status of the species and after taking into account those efforts, if any, being made by any State or foreign nation, or any political subdivision of a State or foreign nation, to protect such species, whether by predator control, protection of habitat and food supply, or other conservation practices, within any area under its jurisdiction; or on the high seas.

(B) In carrying out this section, the Secretary shall give consideration to species which have been-

(i) designated as requiring protection from unrestricted commerce by any foreign nation, or pursuant to any international agreement; or

(ii) identified as in danger of extinction, or likely to become so within the foreseeable future, by any State agency or by any agency of a foreign nation that is responsible for the conservation of fish or wildlife or plants.

(2) The Secretary shall designate critical habitat, and make revisions thereto, under subsection (a)(3) on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat. The Secretary may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned.

(3)(A) [To the maximum extent practicable, within 90 days after] (i) After receiving the petition of an interested person under section 553(e) of title 5, to add a species to, or to remove a species from, either of the lists published under subsection (c), the Secretary shall make a finding as to whether the petition presents substantial scientific or commercial information indicating that the petitioned action may be warranted. If such a petition is found to present such information, the Secretary shall promptly commence a review of the status of the species concerned. The Secretary shall promptly publish each finding made under this subparagraph in the Federal Register.

(ii) The Secretary may prioritize the consideration of petitions under this subparagraph other than in the order in which the petitions are received, except the Secretary may not give general priority to petitions to add species to such a list over petitions to remove a species from such a list.

(B) [Within 12 months] As expeditiously as practicable after receiving a petition that is found under subparagraph (A) to present substantial information indicating that the petitioned action may be warranted, the Secretary shall make one of the following findings:

(i) The petitioned action is not warranted, in which case the Secretary shall promptly publish such finding in the Federal Register.

(ii) The petitioned action is warranted, in which case the Secretary shall promptly publish in the Federal Register a general notice and the complete text of a proposed regulation to implement such action in accordance with paragraph (5).

(iii) The petitioned action is warranted, but that-

(I) the immediate proposal and timely promulgation of a final regulation implementing the petitioned action in accordance with paragraphs (5) and (6) is precluded by pending proposals to determine whether any species is an endangered species or a threatened species, and

(II) expeditious progress is being made to add qualified species to either of the lists published under subsection (c) and to remove from such lists species for which the protections of this chapter are no longer necessary, in which case the Secretary shall promptly publish such finding in the Federal Register, together with a description and evaluation of the reasons and data on which the finding is based.

(iv) (I) In the case of a petition to add a species to a list of threatened species, the petitioned action may be warranted but is precluded due to the likelihood of significant, cumulative economic effects that would result from listing or, to the extent it can be determined, from the likely resulting designation of critical habitat of the species.

(II) The Secretary may not reconsider such finding unless—

(aa) the Secretary determines there is endangerment of extinction of the species; or

(bb) the Secretary receives a new petition to add such species to such list that includes a written qualitative and quantitative analyses reexamining the incremental and significant, cumulative economic effects of likely actions to protect the petitioned species and its potential habitat upon each State and locality that is affected by the petitioned species listing and that, in the opinion of the Secretary, credibly concludes that alternative actions are possible other than those resulting in significant, cumulative economic effects.

(III) In this clause the term ‘significant, cumulative economic effects’ includes economic effects on—

(aa) public land and, to the maximum extent practicable, private land and property values;

(bb) the provision of water, power, or other public services;

(cc) employment; and

(dd) revenues available for State and local governments.

(C)(i) A petition with respect to which a finding is made under subparagraph (B)(iii) shall be treated as a petition that is resubmitted to the Secretary under subparagraph (A) on the date of such finding and that presents substantial scientific or commercial information that the petitioned action may be warranted.

(ii) Any negative finding described in subparagraph (A) and any finding described in subparagraph (B)(i) or (iii) shall be subject to judicial review.

(iii) The Secretary shall implement a system to monitor effectively the status of all species with respect to which a finding is made under subparagraph (B)(iii) and shall make prompt use of the authority under paragraph 7¹ to prevent a significant risk to the well being of any such species.

(D)(i) To the maximum extent practicable, within 90 days after receiving the petition of an interested person under [section 553\(e\) of title 5](#), to revise a critical habitat designation, the Secretary shall make a finding as to whether the petition presents substantial scientific information indicating that the revision may be warranted. The Secretary shall promptly publish such finding in the Federal Register.

(ii) Within 12 months after receiving a petition that is found under clause (i) to present substantial information indicating that the requested revision may be warranted, the Secretary shall determine how he intends to proceed with the requested revision, and shall promptly publish notice of such intention in the Federal Register.

(4) Except as provided in paragraphs (5) and (6) of this subsection, the provisions of [section 553 of title 5](#) (relating to rulemaking procedures), shall apply to any regulation promulgated to carry out the purposes of this chapter.

(5) With respect to any regulation proposed by the Secretary to implement a determination, designation, or revision referred to in subsection (a)(1) or (3), the Secretary shall-

(A) not less than 90 days before the effective date of the regulation-

(i) publish a general notice and the complete text of the proposed regulation in the Federal Register, and

(ii) give actual notice of the proposed regulation (including the complete text of the regulation) to the State agency in each State in which the species is believed to occur, and to each county, or equivalent jurisdiction in which the species is believed to occur, and invite the comment of such agency, and each such jurisdiction, thereon;

(B) insofar as practical, and in cooperation with the Secretary of State, give notice of the proposed regulation to each foreign nation in which the species is believed to occur or whose citizens harvest the species on the high seas, and invite the comment of such nation thereon;

(C) give notice of the proposed regulation to such professional scientific organizations as he deems appropriate;

(D) publish a summary of the proposed regulation in a newspaper of general circulation in each area of the United States in which the species is believed to occur; and

(E) promptly hold one public hearing on the proposed regulation if any person files a request for such a hearing within 45 days after the date of publication of general notice.

(6)(A) Within the one-year period beginning on the date on which general notice is published in accordance with paragraph (5)(A)(i) regarding a proposed regulation, the Secretary shall publish in the Federal Register-

(i) if a determination as to whether a species is an endangered species or a threatened species, or a revision of critical habitat, is involved, either-

(I) a final regulation to implement such determination,

(II) a final regulation to implement such revision or a finding that such revision should not be made,

(III) notice that such one-year period is being extended under subparagraph (B)(i), or

(IV) notice that the proposed regulation is being withdrawn under subparagraph (B)(ii), together with the finding on which such withdrawal is based; or

(ii) subject to subparagraph (C), if a designation of critical habitat is involved, either-

(I) a final regulation to implement such designation, or

(II) notice that such one-year period is being extended under such subparagraph.

(B)(i) If the Secretary finds with respect to a proposed regulation referred to in subparagraph (A)(i) that there is substantial disagreement regarding the sufficiency or accuracy of the available data relevant to the determination or revision concerned, the Secretary may extend the one-year period specified in subparagraph (A) for not more than six months for purposes of soliciting additional data.

(ii) If a proposed regulation referred to in subparagraph (A)(i) is not promulgated as a final regulation within such one-year period (or longer period if extension under clause (i) applies) because the Secretary finds that there is not sufficient evidence to justify the action proposed by the regulation, the Secretary shall immediately withdraw the regulation. The finding on which a withdrawal is based shall be subject to judicial review. The Secretary may not propose a regulation that has previously been withdrawn under this clause unless he determines that sufficient new information is available to warrant such proposal.

(iii) If the one-year period specified in subparagraph (A) is extended under clause (i) with respect to a proposed regulation, then before the close of such extended period the Secretary shall publish in the Federal Register either a final regulation to implement the determination or revision concerned, a finding that the revision should not be made, or a notice of withdrawal of the regulation under clause (ii), together with the finding on which the withdrawal is based.

(C) A final regulation designating critical habitat of an endangered species or a threatened species shall be published concurrently with the final regulation implementing the determination that such species is endangered or threatened, unless the Secretary deems that-

(i) it is essential to the conservation of such species that the regulation implementing such determination be promptly published; or

(ii) critical habitat of such species is not then determinable, in which case the Secretary, with respect to the proposed regulation to designate such habitat, may extend the one-year period specified in subparagraph (A) by not more than one additional year, but not later than the close of such additional year the Secretary must publish a final regulation, based on such data as may be available at that time, designating, to the maximum extent prudent, such habitat.

(7) Neither paragraph (4), (5), or (6) of this subsection nor [section 553 of title 5](#) shall apply to any regulation issued by the Secretary in regard to any emergency posing a significant risk to the well-being of any species of fish or wildlife or plants, but only if-

(A) at the time of publication of the regulation in the Federal Register the Secretary publishes therein detailed reasons why such regulation is necessary; and

(B) in the case such regulation applies to resident species of fish or wildlife, or plants, the Secretary gives actual notice of such regulation to the State agency in each State in which such species is believed to occur.

Such regulation shall, at the discretion of the Secretary, take effect immediately upon the publication of the regulation in the Federal Register. Any regulation promulgated under the authority of this paragraph shall cease to have force and effect at the close of the 240-day period following the date of publication unless, during such 240-day period, the rulemaking procedures which would apply to such regulation without regard to this paragraph are complied with. If at any time after issuing an emergency regulation the Secretary determines, on the basis of the best appropriate data available to him, that substantial evidence does not exist to warrant such regulation, he shall withdraw it.

(8) The publication in the Federal Register of any proposed or final regulation which is necessary or appropriate to carry out the purposes of this chapter shall include a summary by the Secretary of the data on which such regulation is based and shall show the relationship of such data to such regulation; and if such regulation designates or revises critical habitat, such summary shall, to the maximum extent practicable, also include a brief description and evaluation of those activities (whether public or private) which, in the opinion of the Secretary, if undertaken may adversely modify such habitat, or may be affected by such designation.